



BILLING CODE: 6750-01-S

FEDERAL TRADE COMMISSION

16 CFR Parts 700, 701, and 703

RINS 3084-AB24; 3084-AB25; 3084-AB26

Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act; Rule Governing Disclosure of Written Consumer Product Warranty Terms and Conditions; Rule Governing Pre-Sale Availability of Written Warranty Terms; Rule Governing Informal Dispute Settlement Procedures; and Guides for the Advertising of Warranties and Guarantees

AGENCY: Federal Trade Commission.

ACTION: Final revised Interpretations; Final clerical changes to Rules; and Conclusion of review proceedings.

SUMMARY: The Federal Trade Commission (“the Commission”) is announcing its final action in connection with the review of a set of warranty-related Rules and Guides: the Interpretations of the Magnuson-Moss Warranty Act (“Interpretations” or “part 700”); the Rule Governing Disclosure of Written Consumer Product Warranty Terms and Conditions (“Rule 701”); the Rule Governing Pre-Sale Availability of Written Warranty Terms (“Rule 702”); the Rule Governing Informal Dispute Settlement Procedures (“Rule 703”); and the Guides for the Advertising of Warranties and Guarantees (“the Guides” or “part 239”). The Interpretations represent the Commission’s views on various aspects of the Magnuson-Moss Warranty Act (“the Act” or “MMWA”), and are intended to clarify

the Act's requirements. Rule 701 specifies the information that must appear in a written warranty on a consumer product. Rule 702 details the obligations of sellers and warrantors to make warranty information available to consumers prior to purchase. Rule 703 specifies the minimum standards required for any informal dispute settlement mechanism that is incorporated into a written consumer product warranty, and that the consumer must use prior to pursuing any legal remedies in court. The Guides are intended to help advertisers avoid unfair or deceptive practices in the advertising of warranties or guarantees.

DATES: The changes to the Interpretations and Rules will take effect on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: The MMWA, 15 U.S.C. 2301-2312, is the federal law that governs consumer product warranties. Passed by Congress in 1975, the Act requires manufacturers and sellers of consumer products to provide consumers with detailed information about warranty coverage before and after the sale of a warranted product. When consumers believe they are the victim of an MMWA violation, the statute provides them the ability to proceed through a warrantor's informal dispute resolution process or sue in court. On August 23, 2011, the Commission published a Federal Register request for public comment, soliciting written public comments concerning five warranty Rules and Guides: (1) the Commission's Interpretations of the Magnuson-Moss Warranty Act, 16 CFR part 700; (2) the Rule Governing Disclosure of

Written Consumer Product Warranty Terms and Conditions, 16 CFR part 701; (3) the Rule Governing Pre-Sale Availability of Written Warranty Terms, 16 CFR part 702; (4) the Rule Governing Informal Dispute Settlement Procedures, 16 CFR part 703; and (5) the Guides for the Advertising of Warranties and Guarantees, 16 CFR part 239.¹ The Commission requested comments on these Rules and Guides as part of its regulatory review program, under which it reviews rules and guides periodically in order to obtain information about the costs and benefits of the rules and guides under review, as well as their regulatory and economic impact. The information obtained assists the Commission in identifying rules and guides that warrant modification or rescission. After careful review of the comments received in response to the request, the Commission has determined to retain Rules 701, 702, and 703, and the Guides without change, and to modify the Interpretations in §§ 700.10 and 700.11(a). The Commission is also updating the citation format in the Interpretations and Rules.²

In addition, Commission staff has recently issued a number of guidance documents to better educate consumers and businesses concerning their rights and obligations under the MMWA. For example, in order to cure perceived misconceptions in the marketplace, staff issued and recently updated a consumer alert stating that the

¹ 76 FR 52596 (Aug. 23, 2011).

² These clerical changes do not involve any substantive changes in the Rules' requirements for entities subject to the Rules. Accordingly, the Commission finds that public comment is unnecessary. *See* 5 U.S.C. 553(b)(3)(B).

In addition, under the APA, a substantive final rule is required to take effect at least 30 days after publication in the Federal Register unless an agency finds good cause that the rule should become effective sooner. 5 U.S.C. 553(d). However, this is purely a clerical change and is not a substantive rule change. Therefore, the Commission finds good cause to dispense with a delayed effective date.

MMWA prohibits warrantors from voiding an automotive warranty merely because a consumer uses an aftermarket or recycled part or third-party services to repair one's vehicle (subject to certain exceptions).³ Staff also updated the .Com Disclosures to provide additional guidance concerning online warranty disclosure obligations⁴ and issued letters to various online sellers concerning their obligations under the pre-sale availability rule.⁵ Staff will continue to evaluate whether additional guidance is necessary to better inform both consumers and business concerning their rights and responsibilities under the MMWA.

A. BACKGROUND

1. 16 CFR Part 700: Interpretations of the Magnuson-Moss Warranty Act ("Interpretations").

The MMWA, 15 U.S.C. 2301-2312, which governs written warranties on consumer products, was signed into law on January 4, 1975. After the Act was passed, the Commission received many questions concerning the Act's requirements. In

³ FTC, Auto Warranties & Routine Maintenance (July 2011, updated May 2015) ("Consumer Alert on Auto Warranties"), available at <http://www.consumer.ftc.gov/articles/0138-auto-warranties-routine-maintenance>. A warrantor may condition the warranty on the use of certain parts or service if it provides these parts and services without charge to the consumer under the warranty, or alternatively, if the warrantor receives a waiver from the Commission. *See* 15 U.S.C. 2302(c).

⁴ *See* FTC, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013), available at <http://ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>.

⁵ Press Release, FTC, As Holiday Shopping Season Gets Underway, FTC Reminds Internet Retailers to Ensure Consumers Have Access to Warranty Information (Dec. 2, 2013), <http://www.ftc.gov/news-events/press-releases/2013/12/holiday-shopping-season-gets-underway-ftc-reminds-internet>.

responding to these inquiries, the Commission initially published, on June 18, 1975, a policy statement in the Federal Register (40 FR 25721) providing interim guidance during the initial implementation of the Act. As the Commission continued to receive questions and requests for advisory opinions, however, it determined that more comprehensive guidance was appropriate. Therefore, on July 13, 1977, the Commission published in the Federal Register (42 FR 36112) its Interpretations of the MMWA to assist warrantors and suppliers of consumer products in complying with the Act.

These Interpretations are intended to clarify the Act's requirements for manufacturers, importers, distributors, and retailers. The Interpretations cover a wide range of subjects, including: the types of products considered "consumer products" under the Act; the differences between a "written warranty," "service contract" and "insurance"; written warranty term requirements; the use of warranty registration cards under full and limited warranties; and illegal tying arrangements under Section 2302(c) of the Act. These Interpretations, like industry guides, are administrative interpretations of the law. Therefore, they do not have the force of law and are not independently enforceable. The Commission can take action under the Federal Trade Commission Act ("FTC Act") and the MMWA, however, against claims that are inconsistent with the Interpretations if the Commission has reason to believe that such claims are unfair or deceptive practices under Section 5 or violate the MMWA.

2. 16 CFR Part 701: Disclosure of Written Consumer Product Warranty Terms and Conditions.

Section 2302(a) of the MMWA authorizes the Commission to promulgate rules regarding the disclosure of written warranty terms. Accordingly, on December 31, 1975,

the Commission published in the Federal Register (40 FR 60188) its Rule Governing Disclosure of Written Consumer Product Warranty Terms and Conditions. Rule 701 establishes disclosure requirements for written warranties on consumer products that cost more than \$15.00. It also specifies the aspects of warranty coverage that must be disclosed in the written document, as well as the exact language that must be used for certain disclosures regarding state law on the duration of implied warranties and the availability of consequential or incidental damages.

Under Rule 701, warranty information must be disclosed in simple, easily understandable, and concise language in a single document. In promulgating Rule 701, the Commission determined that material facts about product warranties, the nondisclosure of which would be deceptive or misleading, must be disclosed.⁶ In addition to specifying the information that must appear in a written warranty, Rule 701 also requires that, if the warrantor of a limited warranty uses a warranty registration or owner registration card, the warranty must disclose whether return of the registration card is a condition precedent to warranty coverage.⁷

3. 16 CFR Part 702: Pre-Sale Availability of Written Warranty Terms.

Section 2302(b)(1)(A) of the MMWA directs the Commission to prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the prospective purchaser prior to the sale of the product. Accordingly, on December

⁶ See 40 FR 60168, 60169 (Dec. 31, 1975) (“The items required for disclosure by this Rule are material facts about warranties, the non-disclosure of which constitutes a deceptive practice.”).

⁷ Notably, section 2014(b)(1) of the MMWA prohibits warrantors offering a full warranty from imposing duties other than the notification of a defect as a condition of securing warranty remedies. 15 U.S.C. 2304(b)(1).

31, 1975, the Commission published Rule 702. Rule 702 establishes requirements for sellers and warrantors to make the text of any warranty on a consumer product available to the consumer prior to sale. Among other things, Rule 702 requires sellers to make warranties readily available either by: (1) displaying the warranty document in close proximity to the product or (2) furnishing the warranty document on request and posting signs in prominent locations advising consumers that warranties are available. The Rule requires warrantors to provide materials to enable sellers to comply with the Rule's requirements, and also sets out the methods by which warranty information can be made available prior to the sale if the product is sold through catalogs, mail order, or door-to-door sales. As discussed further below, Rule 702 also applies to online sales.

4. 16 CFR Part 703: Informal Dispute Settlement Procedures.

Section 2310(a)(2) of the MMWA directs the Commission to prescribe the minimum standards for any informal dispute settlement mechanism ("IDSM" or "Mechanism") that a warrantor, by including a "prior resort" clause in its written warranty, requires consumers to use before they may file suit under the Act to obtain a remedy for warranty non-performance. Accordingly, on December 31, 1975, the Commission published Rule 703. Rule 703 contains extensive procedural safeguards for consumers that a warrantor must incorporate in any IDSM. These standards include, but are not limited to, requirements concerning the IDSM's structure (e.g., funding, staffing, and neutrality), the qualifications of staff or decision makers, and the IDSM's procedures for resolving disputes, recordkeeping, and annual audits.

5. 16 CFR Part 239: Guides for the Advertising of Warranties and Guarantees.

The Guides for the Disclosure of Warranties and Guarantees, codified in part 239,

provide guidance concerning warranty and guarantee disclosures. Part 239 intends to help advertisers avoid unfair and deceptive practices when advertising warranties and guarantees. The 1985 Guides advise that advertisements mentioning warranties or guarantees should contain a disclosure that the actual warranty document is available for consumers to read before they buy the advertised product. In addition, the Guides set forth advice for using the terms “satisfaction guarantee,” “lifetime,” and similar representations. Finally, the Guides advise that sellers or manufacturers should not advertise that a product is warranted or guaranteed unless they promptly and fully perform their warranty obligations. The Guides are advisory in nature.

B. ANALYSIS OF THE COMMENTS ON THE INTERPRETATIONS, RULE 701, RULE 702, RULE 703, AND THE GUIDES.

Twenty-nine entities and individuals submitted public comments in response to the August 23, 2011 Federal Register request for public comment.⁸ Comments generally reflect a strong level of support for the view that the Interpretations, Rules, and Guides are achieving the objectives they were fashioned to achieve – i.e., to facilitate the consumer’s ability to obtain clear, accurate warranty information. A majority of the commenters, though endorsing retention of the present regulatory scheme, suggested modifications to the Interpretations, Rules, and Guides, which they believe would provide greater consumer protections and minimize burdens on firms subject to the regulations.

1. 16 CFR Part 700: Interpretations.

⁸ 76 FR 52596 (Aug. 23, 2011). Public comments in response to the Commission’s 2011 FRN are located at <http://www.ftc.gov/policy/public-comments/initiative-392>. Comments cited herein to the Federal Register notice are designated as such, and are identified by commenter name, and, where applicable, page number.

a. Amend § 700.10 to provide further guidance on prohibited tying.

Generally, the MMWA prohibits warrantors from conditioning warranties on the consumer's use of a replacement product or repair service identified by brand or name, unless the article or service is provided without charge to the consumer or the warrantor has received a waiver.⁹ The Commission's Interpretations illustrate this concept by stating that phrases such as this warranty is void if service is performed by anyone other than an authorized "ABC" dealer and all replacement parts must be genuine "ABC" parts and the like, are prohibited unless the service or parts are provided free of charge. Such provisions violate the MMWA's ban on tying arrangements and are deceptive under Section 5 of the FTC Act, because a warrantor cannot avoid liability under a warranty where the defect or damage is unrelated to the consumer's use of "unauthorized" parts or service. This does not, however, preclude the warrantor from denying warranty coverage for repairs associated with defects or damage caused by the use of the "unauthorized" parts or service.¹⁰

⁹ See 15 U.S.C. 2302(c). The Commission may waive this prohibition if the warrantor demonstrates to the Commission that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and the waiver is in the public interest. 15 U.S.C. 2302(c).

¹⁰ 16 CFR 700.10.

Several commenters¹¹ assert that the Commission's Interpretations do not address the market realities of manufacturers' statements about the use of branded products. These commenters state that automotive and other consumer product manufacturers have employed language in consumer materials "to suggest that warranty coverage directly or impliedly 'requires' the use of a branded product or service"¹² leading reasonable consumers to believe that coverage under a written warranty will be void if non-original parts or non-dealer services are utilized.¹³ Commenters suggest that these statements lead consumers to doubt the viability of non-original (or recycled) parts.¹⁴ "Faced with such a choice a consumer is likely to use the 'required' product in order to avoid the risk that they may later face potentially expensive repairs that may not be covered under their warranty, resulting in a 'tie' created *via* warranty."¹⁵ Accordingly, these commenters request that the Commission "make clear that warranty language that *creates the impression* that the use of a branded product or service is required in order to maintain

¹¹ Ashland; Automotive Oil Change Association; Automotive Recyclers Association; BP Lubricants; Certified Auto Parts Association; Hunton & Williams; International Imaging Technology Council; LKQ Corporation; Motor & Equipment Manufacturers Association; Monro Muffler Brake; Property Casualty Insurers Association of America; and the Uniform Standards in Automotive Products Coalition ("USAP Coalition"). One commenter, the American Insurance Association, urges the Commission not to change § 700.10. The Coalition for Auto Repair Equality urges the Commission to uphold MMWA's tying prohibitions. Grandpa's Garage comments that GM's recommendation that consumers use its branded oil is helpful because GM explains the right products to use for repair and the prevention of premature failure. Consumer J. McKee generally supports the tying prohibitions.

¹² USAP Coalition at 6.

¹³ Hunton & Williams at 4.

¹⁴ Automotive Recyclers Association at 2.

¹⁵ *Id.*

warranty coverage is ... impermissible.”¹⁶

The MMWA incorporates principles under Section 5 of the FTC Act that prohibit warrantors from disseminating deceptive statements concerning warranty coverage. The MMWA gives the Commission the authority to restrain a warrantor from making a deceptive warranty, which is defined as a warranty that “fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care.”¹⁷ Thus, a warrantor would violate the MMWA if its warranty led a reasonable consumer exercising due care to believe that the warranty conditioned coverage “on the consumer’s use of an article or service identified by brand, trade or corporate name unless that article or service is provided without charge to the consumer.”¹⁸

Moreover, misstatements leading a consumer to believe that the consumer’s warranty is void because a consumer used “unauthorized” parts or service may also be deceptive under Section 5 of the FTC Act.¹⁹ Specifically, claims by a warrantor that create a false impression that a warranty would be void due to the use of “unauthorized” parts or service may constitute a deceptive practice as outlined in the FTC Policy Statement on Deception: “The deception theory is based on the fact that most ads making objective claims imply, and many expressly state, that an advertiser has certain specific

¹⁶ USAP Coalition at 3.

¹⁷ 15 U.S.C. 2310(c).

¹⁸ 16 CFR 700.10.

¹⁹ 15 U.S.C. 45(a). *See generally* Letter from James C. Miller III, Chairman, Fed. Trade Comm’n, et al., to Rep. John D. Dingell (Oct. 14, 1983), reprinted in *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984), available at <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception> (hereinafter “*FTC Policy Statement on Deception*”) at 2.

grounds for the claims. If the advertiser does not, the consumer is acting under a false impression. The consumer might have perceived the advertising differently had he or she known the advertiser had no basis for the claim.”²⁰ A warrantor claiming or suggesting that a warranty is void simply because a consumer used “unauthorized” parts or service would have no basis for such a claim (absent a Commission waiver pursuant to Section 2302(c) of the Act). This is consistent with staff’s view, as expressed in recent opinion letters, that misinformation and misleading statements in conjunction with warranty coverage may be actionable.²¹

Therefore, to clarify the tying prohibition of the MMWA, § 700.10(c) will be changed as described in amendatory instruction 11.

b. Require a mandatory disclosure statement in companies’ warranties.

Several commenters²² ask the Commission to mandate that warrantors providing a warranty to a consumer in connection with a motor vehicle incorporate standard language in their warranties, akin to the FTC’s Consumer Alert on Auto Warranties.²³ These

²⁰ *FTC Policy Statement on Deception*, *supra* note 19 at n14; *see also* 15 U.S.C. 2310(c)(2).

²¹ Consumer Alert on Auto Warranties, *supra* note 3.

²² Ashland at 3; Automotive Oil Change Association at 2; Certified Automotive Parts Association at 2-3; International Imaging Technology Council at 6-7; LKQ Corporation at 10; Monro Muffler Brake at 1-2; USAP Coalition at 14-15.

²³ The Consumer Alert on Auto Warranties informs consumers, among other things, that unless they have been provided parts or services without charge under the warranty, they do not have to use the dealer for repairs and maintenance to keep their warranty in effect, stating, “An independent mechanic, a retail chain shop, or even you yourself can do routine maintenance and repairs on your vehicle. In fact, the Magnuson-Moss Warranty Act, which is enforced by the FTC, makes it illegal for manufacturers or dealers to claim that your warranty is void or to deny coverage under your warranty simply because someone other than the dealer did the work.” Consumer Alert on Auto Warranties, *supra* note 3.

commenters state that, although the FTC’s Consumer Alert on Auto Warranties informs consumers of their rights under the MMWA, consumers should receive information about these rights in an owner’s manual or warranty document pursuant to a Commission-mandated disclosure. These commenters ask the Commission to amend its Interpretations so that these warrantors would be required to provide in boldface type on the first page of a written automobile warranty: “Warranty coverage cannot be denied unless the warrantor or service provide[r] [sic] can demonstrate that the defect or damage was caused by the use of unauthorized articles or services.”²⁴ Commenters base their recommendation, in part, on the language mandated by the Clean Air Act for use in user manuals, namely, that “maintenance, replacement, or repair of the emissions control devices and systems may be performed by any automotive repair establishment or individual using any automotive part.”²⁵

The Commission declines to make this change. As an initial matter, the MMWA, unlike the Clean Air Act, does not require a mandatory disclaimer on all warranties. Further, the current record lacks sufficient evidence to justify the imposition of a mandatory warranty disclosure requirement for a subset of warrantors.²⁶

²⁴ USAP Coalition at 14. Elsewhere, however, the commenters propose other specific language for the Commission to add to its Interpretations that would not be limited to mandatory disclosures in warranty documents but would extend to owner’s manuals and other communications with prospective consumers. USAP Coalition at 20, Att. B; Automotive Oil Change Association at 6 (referring to “warranty documents and related communications.”).

²⁵ USAP Coalition at 14, citing 42 U.S.C. 7541(c)(3)(A).

²⁶ The Specialty Equipment Market Association (“SEMA”) asks the Commission to prepare a supplemental consumer alert to specifically reference “specialty parts.” SEMA at 2. A supplemental consumer alert is not necessary as the existing consumer alert applies to all non-original (or recycled) parts.

c. *Clarify that use of an aftermarket or recycled component is not a prima facie justification for warranty denial.*

One commenter²⁷ asks the Commission to clarify that the use of aftermarket components is not a prima facie justification for warranty denial. The Interpretations and related educational materials already make clear that the mere use of an aftermarket (or recycled) component alone is not a sufficient justification for warranty denial. As discussed above, a warrantor cannot disclaim warranty coverage if a defect or damage is unrelated to the consumer's use of "unauthorized" products or service, unless the warrantor provides the service or part without charge under the warranty or receives a Commission waiver.²⁸ A warrantor can refuse coverage where the warrantor can demonstrate that the defect or damage was caused by the use of the "unauthorized" part or service.²⁹

Several commenters ask the Commission to better educate consumers on how to identify and report warranty tying in the marketplace. In July 2011, the staff issued a consumer alert highlighting MMWA's tying prohibitions. The alert explained: "Simply using an aftermarket or recycled part does not void your warranty. The Magnuson-Moss Warranty Act makes it illegal for companies to void your warranty or deny coverage under the warranty simply because you used an aftermarket or recycled part."³⁰

²⁷ Ashland at 2.

²⁸ 16 CFR 700.10(c).

²⁹ *Id.*

³⁰ See Consumer Alert on Auto Warranties, *supra* note 3. As stated in the updated consumer alert, the manufacturer or dealer can, however, require consumers to use select parts if those parts are provided to consumers free of charge under the warranty.

d. Require that warrantors have substantiation for their performance claims regarding non-original parts.

Several commenters³¹ ask the Commission to require that warrantors have substantiation for their claims that original equipment manufacturer (“OEM”) parts work better than non-original or recycled parts. This specific request is outside the purview of the Act and relates generally to the requirement under Section 5 of the FTC Act that companies have sufficient basis for their claims. Section 5 requires warrantors making performance claims regarding non-original or recycled parts to have a reasonable basis for those claims, thereby ensuring that such claims are not unfair, deceptive, false, or misleading. Similarly, advertisers must have adequate substantiation – or a reasonable basis – for any advertising claims they make before the claims are disseminated. Under the substantiation doctrine, “firms lacking a reasonable basis before an ad is disseminated violate Section 5 of the FTC Act.”³²

e. Require warranty denial to be in writing.

The Commission’s Interpretations state that a warrantor is not precluded from denying warranty coverage for defects or damage caused by the use of “unauthorized” parts or service if the warrantor “demonstrates” that the “unauthorized” parts or service caused a defect or damage to the vehicle.³³ Commenters³⁴ state that, in some instances, warrantors have denied warranty coverage without sufficiently demonstrating to

³¹ Ashland at 6-7; LKQ Corporation at 8; USAP Coalition at 15-16.

³² *FTC Policy Statement Regarding Advertising Substantiation*, appended to *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986).

³³ 16 CFR 700.10(c).

³⁴ Ashland at 3; Automotive Oil Change Association at 6-7; BP Lubricants at 3, Certified Auto Parts Association at 4-5; SEMA at 3; USAP Coalition at 15-16.

consumers that the use of “unauthorized” parts or service caused defects or damage to the consumer’s vehicle by, for example, giving consumers a copy of a service bulletin or just “say[ing] so.”³⁵ Commenters therefore ask the Commission to require, in its Interpretations, that warrantors provide consumers with a written statement to support any warranty denial claim.

The Commission does not believe a change is warranted because the current record lacks sufficient evidence showing that warrantors routinely deny warranty coverage orally without demonstrating to the consumer that the “unauthorized” part or service caused damage to the vehicle. At this time, the Commission believes the existing Interpretations adequately address this issue.

Simply providing a consumer with a copy of a service bulletin or denying coverage with a bald, unsupported statement that the “unauthorized” parts or service caused the vehicle damage would be insufficient under the Commission’s existing Interpretations. Warrantors must have a basis for warranty denials by demonstrating to consumers that the use of “unauthorized” parts or service caused the defect or damage to the vehicle. Further, denying warranty coverage by simply pointing to a service bulletin that informs consumers that only “authorized” parts or service should be used to maintain warranty coverage may also violate the MMWA’s proscriptions against tying.³⁶ Therefore, whether the demonstration is in writing or oral, a warrantor denying warranty coverage due to the use of “unauthorized” parts or service must show that such use caused the defect or damage to the vehicle.

³⁵ Certified Auto Parts Association at 5.

³⁶ 16 CFR 700.10(c).

f. The scope of auto dealers' responsibilities under the MMWA and Interpretations.

Two commenters³⁷ address the scope of auto dealers' (which fall under MMWA's definition of "supplier"³⁸) responsibilities under the MMWA and Interpretations.³⁹ First, the National Consumer Law Center ("NCLC") asks the Commission to add an interpretation stating that a supplier enters into a service contract with a consumer whenever the supplier offers a service contract to the consumer, irrespective of whether the supplier is obligated to perform under the service contract.⁴⁰ The Commission declines to add the requested interpretation.

Existing staff guidance provides that "sellers of consumer products that merely sell service contracts as agents of service contract companies and do not themselves extend written warranties" do not "enter into" service contracts.⁴¹ This guidance parallels the MMWA's provisions concerning a seller's liability under the MMWA for merely selling a third party's warranty: "only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person."⁴²

³⁷ Center for Auto Safety at 2; NCLC at 10.

³⁸ The MMWA defines "supplier" as "any person engaged in the business of making a consumer product directly or indirectly available to consumers." 15 U.S.C. 2301(4).

³⁹ Center for Auto Safety at 2.

⁴⁰ NCLC at 10.

⁴¹ See FTC, The Businessperson's Guide to Federal Warranty Law, available at <http://www.business.ftc.gov/documents/bus01-businesspersons-guide-federal-warranty-law>; 15 U.S.C. 2308(a)(2).

⁴² 15 U.S.C. 2310(f).

In keeping with the MMWA, the Commission's Interpretations concerning parties "actually making" a written warranty provide that a supplier who simply distributes or sells a consumer product warranted by another person or business is not liable for failure of the written warranty to comply with the Act.⁴³ Accordingly, the Commission will not add the requested interpretation concerning service contracts.

The second commenter, the Center for Auto Safety, seeks clarity to address the discrepancy it perceives between the MMWA and the staff's guidance concerning the circumstances under which an auto dealer (i.e., supplier) can disclaim implied warranties when offering service contracts. It argues that, on one hand, Section 2308(a)(2) of the MMWA states: "no supplier may disclaim or modify ... any implied warranty to a consumer with respect to such consumer product if ... at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product."⁴⁴ On the other hand, the FTC's Businessperson's Guide to Federal Warranty Law states: "[s]ellers of consumer products who make service contracts on their products are prohibited under the Act from disclaiming or limiting implied warranties. ... However, sellers of consumer products that merely sell service contracts as agents of service contract companies and do not themselves extend written warranties can disclaim implied warranties on the products they sell."⁴⁵

⁴³ 16 CFR 700.4. Section 700.4 further provides, however, that other actions and written and oral representations of such a supplier in connection with the offer or sale of a warranted product may obligate that supplier under the Act. If under State law the supplier is deemed to have "adopted" the written affirmation of fact, promise, or undertaking, the supplier is also obligated under the Act.

⁴⁴ 15 U.S.C. 2308(a)(2).

⁴⁵ The Businessperson's Guide to Federal Warranty Law, *supra* note 41.

The Commission does not believe any discrepancy exists. The confusion may stem from the usage of the word “supplier,” defined in the MMWA as: “any person engaged in the business of making a consumer product directly or indirectly available to consumers.”⁴⁶ Thus, “supplier” can mean either the entity that “enters into a service contract with the consumer” or the entity that “merely sells” a third-party’s service contract, without more. The latter, as explained previously,⁴⁷ has not entered into a service contract with the consumer, and therefore Section 2308(a)(2) would not apply.⁴⁸

Suppliers, however, are not immune from liability. If a supplier sells a service contract that obligates it to perform under the contract, it will be deemed to have entered into the service contract within the meaning of the statute. In addition, suppliers who extend service contracts utilizing misrepresentations or material omissions may be subject to liability under the MMWA and Section 5 of the FTC Act.⁴⁹

g. Enforce the Act.

Commenters⁵⁰ encourage the Commission to enforce the MMWA. The Commission enforces the Act by monitoring consumer complaints, reviewing audit

⁴⁶ 15 U.S.C. 2301(4).

⁴⁷ The Businessperson’s Guide to Federal Warranty Law, *supra* note 41.

⁴⁸ 15 U.S.C. 2308(a)(2).

⁴⁹ 15 U.S.C. 2306(b) (requiring warrantors and suppliers to clearly and conspicuously disclose service contract terms and conditions); 15 U.S.C. 45.

⁵⁰ LKQ Corp. at 1 and 5; Motor & Equipment Manufacturers Association at 2-3.

reports, advising warrantors of their obligations, educating consumers and businesses, and taking enforcement action where appropriate.⁵¹

h. Apply rules to leases and define “lease.”

NCLC urges the Commission to amend § 700.10 to clarify that the MMWA covers consumer leases.⁵² The majority of courts have found that a lessee meets the definition of “consumer” in the MMWA because warranty rights are transferred to lessees or the lessees are permitted to enforce the contract under state law, among other reasons.⁵³ As NCLC notes, however, some courts have held that a lessee does not meet the definition of “consumer.” These courts have generally found that the definition of “consumer” presupposes a transaction that qualifies as a sale under the Act, and that the lease transaction at issue was not a qualifying sale.⁵⁴ NCLC therefore asks the Commission to add a new Interpretation, as § 700.13, titled, “consumer leases,” to provide explicitly that the Act applies to consumer leases.⁵⁵

The Commission does not agree with the view held by a minority number of courts that lessees cannot be a “consumer” under the MMWA because each prong of the

⁵¹ See, e.g., Compl., *BMW of N. Am., LLC*, File No. 132 3150, available at <https://www.ftc.gov/system/files/documents/cases/150319bmwcmpt.pdf> (Fed. Trade Comm’n March 19, 2015); Consumer Alert on Auto Warranties, *supra* note 3. Consumers or businesses may file complaints with the Commission online through <https://www.ftccomplaintassistant.gov> or by calling the Commission’s toll-free number, 1-877-FTC-HELP (1-877-382-4357).

⁵² NCLC at 3.

⁵³ See, e.g., *Voelker v. Porsche Cars N. Am., Inc.*, 353 F.3d 516 (7th Cir. 2003); *Mago v. Mercedes-Benz, U.S.A., Inc.*, 142 P.3d 712 (Ariz. Ct. App. 2006); *Am. Honda Motor Co. v. Cerasani*, 955 So.2d 543 (Fla. 2007).

⁵⁴ See, e.g., *Stark v. Maserati N. Am., Inc.*, 2010 WL 4916981 (E.D.N.Y. Oct. 13, 2010); *DiCintio v. DaimlerChrysler Corp.*, 768 N.E.2d 1121 (N.Y. 2002).

⁵⁵ NCLC at 5.

“consumer” definition⁵⁶ presupposes a sale to the end-consumer (which in this case is a lessee). Rather, as the majority of courts have held, lessees meet the definition of a “consumer” because warranty rights are either transferred to lessees or the lessees are permitted to enforce the contract under state law.⁵⁷ Given that a majority of courts hold that the MMWA applies to certain leases, consistent with past agency guidance,⁵⁸ a new Interpretation is not necessary.

i. Certain 50/50 warranties should be interpreted to violate the Act’s anti-tying prohibition.

NCLC urges the Commission to reconsider its 2002 opinion letter⁵⁹ finding “50/50 warranties” permissible under the Act. Fifty/fifty warranties are those where the dealer promises to pay 50% of the labor costs and 50% of the parts cost, and the consumer pays the remainder. NCLC argues that allowing the warrantor to choose the

⁵⁶ 15 U.S.C. 2301(3) (“The term ‘consumer’ means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).”).

⁵⁷ See, e.g., *supra* note 53.

⁵⁸ The agency has provided similar guidance. See Advisory Opinion from Rachel Dawson to Raymond Asher (June 10, 1976) (“A leased product would be covered if the lease is essentially equivalent to a sale. For example, a product would be covered if the total compensation to be paid by the lessee is substantially equivalent to or in excess of the value of the product, and the lessee will own the product, or has an option to buy it for a nominal consideration, upon full compliance with his obligations under the lease.”).

⁵⁹ NCLC at 6-7, citing Letter from Donald S. Clark to Keith E. Whann (Dec. 2, 2002), available at http://www.ftc.gov/system/files/documents/advisory_opinions/national-independent-automobile-dealer-association/clark_to_whann_letter.pdf.

repairs or parts is contrary to the goals of the MMWA, and leads to monopolistic pricing practices and a decrease in competition.⁶⁰

Although the Commission found that 50/50 warranties may violate the Act in certain circumstances in its 1999 rule review, in 2002, the Commission clarified its position on 50/50 warranties. The Commission stated that the Act prohibits warrantors from conditioning their warranties on the use of branded parts or service where the warranted articles or services are “severable from the dealer’s responsibilities under the warranty.”⁶¹ Therefore, when a warranty covers only replacement parts, and the consumer pays the labor charges, the warrantor cannot mandate specific service or labor to install those parts. Conversely, when a warranty covers only labor charges, and the consumer pays for parts, the warrantor cannot mandate the use of specific parts. With 50/50 warranties, however, “the warranting dealer has a direct interest in providing the warranty service for which it is partly financially responsible. ... Rather than conditioning the warranty on the purchase of a separate product or service not covered by the warranty, a 50/50 warranty shares the cost of a single product or service.”⁶² For that reason, the warrantor needs some control over the repair needed and quality of repair.⁶³ The Commission has decided to retain its 2002 position on 50/50 warranties. The Commission has reviewed the issue and believes that its 2002 interpretation continues to be correct.

⁶⁰ NCLC at 6.

⁶¹ Letter from Donald S. Clark to Keith E. Whann (Dec. 2, 2002), *supra* note 59.

⁶² *Id.* at 2.

⁶³ *Id.*

j. *The Commission's Interpretation under § 700.11(a) conflicts with the McCarran-Ferguson Act and Supreme Court precedent.*

NCLC asserts that the Commission has incorrectly interpreted the meaning of the McCarran-Ferguson Act in § 700.11(a).⁶⁴ The McCarran-Ferguson Act provides that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That ... the Sherman Act, ... the Clayton Act, and ... the Federal Trade Commission Act ... shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.”⁶⁵ Section 700.11 states that agreements regulated by state law as insurance are subject to the MMWA “only to the extent they are not regulated in a particular state as the business of insurance.”⁶⁶

NCLC states that the Interpretation is inconsistent with both the McCarran-Ferguson Act and Supreme Court precedent.⁶⁷ First, NCLC argues that because the MMWA is not one of the three enumerated statutes (the Sherman Act, Clayton Act or the FTC Act), the correct standard is the standard applicable to all other federal statutes. In other words, the MMWA can regulate the business of insurance so long as it does not “invalidate, impair, or supersede” state law. Therefore, even if a state regulates a service agreement as the business of insurance, the MMWA may still apply.⁶⁸ Second, NCLC

⁶⁴ NCLC at 9.

⁶⁵ 15 U.S.C. 1012(b).

⁶⁶ 16 CFR 700.11(a).

⁶⁷ NCLC at 8-9.

⁶⁸ *Id.* at 8.

asserts the Commission’s Interpretation is contrary to Supreme Court precedent, *Humana v. Forsyth*, 525 U.S. 299 (1999). There, the Supreme Court held that states’ regulation of insurance fraud would not displace remedies under federal law for the same misconduct because they do not “impair the insurance regulatory scheme.”⁶⁹ Consequently, NCLC states, “even though state insurance law provides a remedial scheme for breach of a service contract regulated as insurance, the additional availability of Magnuson-Moss remedies for the same misconduct does not ‘impair’ the insurance regulatory scheme.”⁷⁰

The Commission agrees that the McCarran-Ferguson Act’s “invalidate, impair, or supersede” standard is applicable to the MMWA. The Commission will revise the Interpretation as described in amendatory instruction 12.

k. Amend definition of “consumer product.”

SEMA asks the Commission to amend the definition of “consumer product” to include specialty equipment.⁷¹ The Commission has determined that no definitional change is warranted because specialty equipment is already covered by the definition of “consumer product.” “Consumer product” is defined as “any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes.”⁷²

2. 16 CFR Part 701: Disclosure of Terms and Conditions (Rule 701).

a. Regulate service contract disclosures.

⁶⁹ *Id.* at 9.

⁷⁰ *Id.*

⁷¹ SEMA at 2. Specialty equipment includes performance, functional, restoration and styling-enhancement products for use on passenger cars and light-duty trucks. *Id.* at 1.

⁷² 16 CFR 701.1(b).

The request for public comment specifically asked whether the Commission should amend the Rules to cover service-contract disclosures.⁷³ The Commission received six comments on this issue: four commenters urge the Commission not to add specific service-contract disclosure requirements, while two commenters take the opposite view.⁷⁴ The four opponents of disclosure rules for service contracts state that

⁷³ The Association of Home Appliance Manufacturers (“AHAM”) asks for additional changes to Rule 701. First, AHAM asks the Commission to amend Rule 701.3 by adding that any warrantor complying with the Rule is entitled to a presumption in any breach of warranty litigation that the warranty is not unconscionable, deceptive, or misleading. AHAM at 2. It argues that consumers file hundreds of class actions each year asking courts to invalidate or modify the terms of a written warranty. *Id.* Although Rule 701.3 sets out minimum federal disclosure requirements for consumer product warranties, warrantors must also follow the proscriptions of Section 5 of the FTC Act, prohibiting unfair and deceptive practices, and various applicable state laws. Because there are other laws governing unfairness or deception in warranties, the Commission does not believe it would be appropriate to create a new provision in the Warranty Rules specifying that warrantors complying with Rule 701.3 are entitled to a presumption that their warranties are not unconscionable, deceptive, or misleading. Second, AHAM asks the Commission to amend Rule 701.3 by adding that a warrantor can exclude any latent defects that may manifest after the written warranty period expires. *Id.* at 3. AHAM asserts that many lawsuits seek to expand or modify the express warranty’s terms after sale, and beyond the contractually-limited time period, to cover an alleged latent defect that manifests itself post-warranty period. However, Rule 701.3 focuses on disclosure requirements for consumer product warranties. It requires the disclosure of several items of material information in a clear and conspicuous manner. Rule 701.3 does not mandate specific warranty coverage. Nor does the Rule itself cover post-warranty conduct. Therefore, no change is warranted. Mr. Steinborn asks the Commission to modify Rule 701 so that third-party manufacturers or re-fillers of consumables, such as ink and toner, must include a marking prominently displayed on the consumable that clearly directs the end user to contact the party that remanufactured the consumable (or its designee) for all warranty claims and information. Steinborn at 2. However, Rule 701 already requires that warranty terms include a step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation. 16 CFR 701.3(a)(5). For this reason, the Commission has chosen not to incorporate the specific change advocated by Mr. Steinborn.

⁷⁴ Opponents of federal service-contract disclosure regulations are the AHAM, Florida Service Agreement Association, Service Contract Industry Council, and Property Casualty Insurers Association of America. Mr. Johnson and NCLC support the Commission’s promulgation of service-contract disclosure regulations.

service contracts are different from warranties in that they do not form the basis of the bargain. They argue that no federal regulation is needed because states already regulate service contracts and adding federal regulation to the mix would create unnecessary burdens to both the industry and to federal and state governments.⁷⁵

On the other hand, two commenters, Mr. Evan Johnson and NCLC, argue that the Commission should amend the Rules to prescribe the manner and form in which service-contract terms are disclosed. Mr. Johnson argues that service contracts have been a “huge source” of consumer complaints. “Many of these complaints concern marketing but many also arise from the unclear wording and structure of the contracts.”⁷⁶ NCLC provides two reasons why the Commission should specifically regulate service contracts. First, the reasons for mandatory disclosure requirements for warranties apply equally to service contracts; regulating one and not the other makes little sense.⁷⁷ Second, service contracts are widely sold and expensive, and consumers have little information concerning costs, coverage, and claims process.⁷⁸

⁷⁵ See Florida Service Agreement Association at 2-3; Service Contract Industry Council at 2-3. For example, the Service Contract Industry Council states that thirty-five states specifically regulate service contracts on consumer goods, thirty-five states regulate service contracts on homes, and thirty-eight states regulate service contracts on motor vehicles. Commenters assert that many of these state laws provide greater protection to consumers than the MMWA by, for example, “ensuring that service contract obligors are financially sound and that their obligations to consumers are secure.” Because the MMWA preempts state warranty law unless the state law “affords protection to consumers greater than the requirement of Magnuson-Moss,” these commenters argue that additional federal regulations may have little practical effect.

⁷⁶ Johnson at 4.

⁷⁷ NCLC at 12.

⁷⁸ *Id.*

The Commission does not believe such a rule amendment is needed because the MMWA and Section 5 already require that warrantors, suppliers, and service contract providers clearly and conspicuously disclose service contract terms and conditions. Section 2306(b) of the Act provides: “[n]othing in this chapter shall be construed to prevent a supplier or warrantor from entering into a service contract with the consumer in addition to or in lieu of a written warranty if such contract fully, clearly, and conspicuously discloses its terms and conditions in simple and readily understood language.”⁷⁹ In addition, Section 5 prohibits service contract providers from failing to clearly and conspicuously disclose material terms and conditions or otherwise deceiving consumers with respect to the scope and nature of service contracts. This is in accord with the Businessperson’s Guidance to the MMWA: “If you offer a service contract, the Act requires you to list conspicuously all terms and conditions in simple and readily understood language.”⁸⁰ The Commission has issued a number of consumer education pieces on service contracts and extended warranties and will take action where warranted.⁸¹

3. 16 CFR Part 702: Pre-Sale Availability Rule (Rule 702).

Generally, under Rule 702, sellers who offer written warranties on consumer products must include certain information in their warranties and make them available for

⁷⁹ 15 U.S.C. 2306(b).

⁸⁰ The Businessperson’s Guide to Federal Warranty Law, *supra* note 41.

⁸¹ *See, e.g.*, FTC, Auto Service Contracts and Warranties, <http://www.consumer.ftc.gov/articles/0054-auto-service-contracts-and-warranties>; *see also* *FTC v. Voicetouch*, Civ. No. 09CV2929 (N.D. Ill., filed May 13, 2009) (action involving deceptive telemarketing of extended auto warranties); *FTC v. Transcontinental Warranty, Inc.*, Civ. No. 09CV2927 (N.D. Ill., filed May 13, 2009) (same). The Commission will continue to examine service contract disclosures.

review at the point of purchase. The Commission's request for public comment asked whether the Commission should amend Rule 702 to specifically address making warranty documents accessible online.

The Commission received seven comments on this specific question.⁸² One commenter noted at the outset that Rule 702 "continues to be very important to consumers. Consumers are very aware of warranties and use warranty differences as a basis for choosing a product. The current rule is a reasonable and cost-effective approach to providing the information."⁸³

Three commenters ask the Commission to specifically reference Internet sales in Rule 702 and provide additional guidance on how retailers can comply with the Rule by referring consumers to warrantors' websites.⁸⁴ Although Rule 702 does not explicitly mention online commerce, it applies to the sale of warranted consumer products online. Staff recently updated the .Com Disclosures to provide additional guidance on disclosure obligations in the online context. As stated in the updated .Com Disclosures, warranties

⁸² AHAM at 3; Center for Auto Safety at 2; Eisenberg at 1; Johnson at 2-3; National Automobile Dealers Association at 2; National Independent Automobile Dealers Association at 2; Steinborn at 2-3. Ms. Eisenberg asks the Commission to amend the Rule to permit private actions for violations of Rule 702. However, the MMWA already provides a private cause of action to any consumer "who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation" under the MMWA. 15 U.S.C. 2310(d)(1).

⁸³ Johnson at 2.

⁸⁴ AHAM at 3; National Independent Automobile Dealers Association at 2; Steinborn at 2-3. The Center for Auto Safety recommends that Rule 702.3 point of sale requirements be maintained and enforced, requiring hard copy warranty materials to be available at physical retail locations, not on CD or DVD. Staff's guidance allows warranties to be available on CDs and DVDs, but does not allow sellers to meet their pre-sale obligations by referring consumers to CDs or DVDs that are not readily accessible at the point of sale. *See* Letter from Allyson Himelfarb to Thomas M. Hughes (Feb. 17, 2009), available at <http://www.ftc.gov/bcp/warranties/opinion0901.pdf>.

communicated through visual text online are no different than paper versions and the same rules apply.⁸⁵ Online sellers of consumer products can easily comply with the pre-sale availability rule in a number of ways. Online sellers can, for example, use “a clearly-labeled hyperlink, in close conjunction to the description of the warranted product, such as ‘get warranty information here’ to lead to the full text of the warranty.”⁸⁶

As with other online disclosures, warranty information should be displayed clearly and conspicuously. Therefore, for example, warranty terms buried within voluminous “terms and conditions” do not satisfy the Rule’s requirement that warranty terms be in close proximity to the warranted product. Further, general references to warranty coverage, such as “one year warranty applies,” are also not sufficient.⁸⁷

The Commission however, does not agree with the view endorsed by commenters⁸⁸ that offline sellers can comply with the pre-sale availability rule by advising buyers of the availability of warranties on the warrantor’s website. The intent of the Rule is to make warranty information available at the point of sale. For brick and mortar transactions, the point of sale is in the store; for online transactions, the point of sale is where consumers purchase the product online.

⁸⁵ See .COM DISCLOSURES, *supra* note 4, at 3, n7.

⁸⁶ *Id.*

⁸⁷ FTC Staff has found several instances in which online sellers have not fully complied with the pre-sale availability rule and has contacted these sellers to inform them of their obligations. <http://www.ftc.gov/opa/2013/12/warningletters.shtml>

⁸⁸ AHAM at 4-5; *see also* Steinborn at 2 (“Where manufacturers and resellers have Internet presences, click-through access to and/or a conspicuous reference to the manufacturers’ website containing the applicable warranty should be recognized as sufficient means for sellers to meet the requirements of 702.”).

The Commission agrees with the commenter who notes: “Internet availability, however, is not a substitute for availability as specified in Rule 702 because many consumers make little or no use of the internet, while those who do still need the information at the point of sale as a fallback for when they haven’t obtained the information online or when they want to verify that their online information is accurate.”⁸⁹

In sum, because Rule 702 already covers the sale of consumer products online, and because staff has updated its .Com Guidance concerning compliance with pre-sale obligations online, the Commission has chosen not to engage in additional rulemaking as to Rule 702 at this time.

4. Rule 703 – Informal Dispute Settlement Procedures.

The Commission’s request for public comment specifically asked whether it should change Rule 703, and if so, how. Six commenters submitted responses to this question.⁹⁰ At the outset, commenters highlighted the importance of the Rule in serving as a standard for IDSMs in general, and more specifically, in providing a benchmark for state lemon law IDSMs and certification programs for IDSMs. Many states’ criteria focus on the IDSM’s compliance with Rule 703’s provisions. Therefore, commenters stressed that any repeal or change to Rule 703 will also affect state lemon law and certification programs.⁹¹ Notwithstanding this fact, some commenters ask the Commission to change certain elements of the Rule, including the Mechanism’s

⁸⁹ Johnson at 2.

⁹⁰ AHAM at 6; Center for Auto Safety at 1; Johnson at 3; International Association of Lemon Law Administrators at 1; NCLC at 14-15; Nowicki at 1-2.

⁹¹ See International Association of Lemon Law Administrators at 1.

procedure, record-keeping, and audit requirements, and also reassess the Commission's position on binding arbitration clauses in warranty contracts. These comments are discussed below. Overall, the Commission leaves Rule 703 unchanged.

a. Modify the IDSM procedures.

AHAM claims that the procedures prescribed in Rule 703 are difficult to follow and implement.⁹² It urges the Commission to simplify the procedures so they would be “more easily and widely implemented by warrantors.”⁹³ It further asserts that “a change would benefit consumers, businesses, and courts by streamlining the dispute resolution procedure and, thereby, reducing the burden on state and federal courts of adjudicating some warranty disputes, as many more could be handled through informal, but structured proceedings.”⁹⁴ AHAM does not proffer any specific changes that should be made, or provide examples of why the procedures described in Rule 703 are difficult to follow. As the Commission stated in 1975 when adopting the Rule, “[t]he intent is to avoid creating artificial or unnecessary procedural burdens so long as the basic goals of speed, fairness, and independent participation are met.”⁹⁵ Further, staff's review of IDSM audits have not indicated any significant concern with IDSM procedures. The Commission therefore retains the Rule 703 procedures.

b. Change rules on Mechanism and auditor impartiality.

⁹² AHAM at 6.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 40 FR 60168, 60193 (Dec. 31, 1975).

Two commenters⁹⁶ state that Rule 703.4 should be amended because neither the Mechanism nor the auditor, who is selected by the Mechanism, is impartial. Mr. Nowicki asks the Commission to require the Mechanism to be completely independent of any warrantor or trade association. Further, both the Center for Auto Safety and Mr. Nowicki assert that a Mechanism should not select an auditor because doing so creates a conflict of interest. The Center for Auto Safety recommends that the Commission select an auditor for a fee, and determine whether the Mechanisms are fair and expeditious.

No changes are warranted because Rule 703 already imposes specific requirements concerning the impartiality of both the Mechanism and the auditor that the Mechanism selects. For example, Rule 703.3(b) requires the warrantors and sponsors of IDSMs to take all necessary steps to ensure that the Mechanism, and its members and staff, are sufficiently insulated from the warrantor and the sponsor, so that the members' and staff's decisions and performance are not influenced by either the warrantor or the sponsor.⁹⁷ The Rule imposes minimum criteria in this regard: (1) committing funds in advance; (2) basing personnel decisions solely on merit; and (3) not assigning conflicting warrantor or sponsor duties to the Mechanism.⁹⁸ Additional safeguards for impartiality are set forth in Rule 703.4 governing qualification of members.

As to auditors' impartiality, although the Mechanism may select its own auditor, Rule 703.7(d) provides that "[n]o auditor may be involved with the Mechanism as a warrantor, sponsor or member, or employee or agent thereof, other than for purposes of

⁹⁶ Center for Auto Safety at 1; Nowicki at 1.

⁹⁷ 16 CFR 703.3(b).

⁹⁸ *Id.*

the audit.”⁹⁹ Further, IDSM audits have found “no situation of conflict or circumstance which might give rise to an impression that [a conflict of interest] exists.”¹⁰⁰ Therefore, the Rule contains sufficient safeguards against partiality.

c. Modify the information to be submitted to the Mechanism.

Rule 703.5(d) requires the Mechanism to render a decision “at least within 40 days of notification of the dispute.”¹⁰¹ The Center for Auto Safety asks the Commission to amend Section 703.5 to provide that the “40 day deadline begins upon the consumer filing a substantially complete application regardless of whether the VIN is provided or not.”¹⁰² The Center for Auto Safety claims that the Better Business Bureau is evading the 40-day deadline, because the BBB does not request Vehicle Identification Number (“VIN”) information on its consumer intake form but the BBB will only begin to consider the dispute after it receives the VIN number.

Section 703.5 requires the Mechanism to “investigate, gather and organize all information necessary for a fair and expeditious decision in each dispute.”¹⁰³ This provision “implicitly permits Mechanisms to require consumers to provide the Mechanism with information ‘reasonably necessary’ to decide the dispute.”¹⁰⁴ When

⁹⁹ 16 CFR 703.7(d).

¹⁰⁰ See, e.g., Morrison and Company, 2013 Audit of BBB Auto Line, available at http://www.ftc.gov/sites/default/files/documents/reports_annual/2013-audit-better-business-bureau-auto-line-including-state-florida-and-state-ohio/2013bbbautoline.pdf, at 6. The audit further found that “consumers are pleased with the impartiality and the quality of dispute resolution services” *Id.*

¹⁰¹ 16 CFR 703.5(d).

¹⁰² Center for Auto Safety at 1.

¹⁰³ 16 CFR 703.5(c).

¹⁰⁴ See Staff Advisory Opinion to Mr. Dean Determan, at 6, n6 (Aug. 28, 1985).

adopting the final Rule in 1975, the Commission noted the Rule's "intent is to avoid creating artificial or unnecessary procedural burdens so long as the basic goals of speed, fairness and independent participation are met."¹⁰⁵ Therefore, because the Mechanism must have some flexibility in deciding the information necessary for it to make a determination, the Commission will retain Rule 703.5 unchanged. The Commission encourages, however, open dialogue between industry groups and the BBB to address any remaining concerns.¹⁰⁶

d. Mechanism's decisions as non-binding.

The Commission received three comments concerning Rule 703.5(j)'s provision prohibiting binding arbitration provisions in warranty contracts.¹⁰⁷ AHAM urges the Commission to delete this provision because "it creates disincentives for manufacturers or sellers to create a Mechanism in the first instance and leads to wasted and duplicative efforts in cases between the consumers and manufacturers or sellers."¹⁰⁸ NCLC and Mr. Johnson ask the Commission to retain Rule 703.5(j).¹⁰⁹

When the Commission first promulgated Rule 703.5(j) in 1975, it did so based on the MMWA's language, legislative history, and purpose: to ensure that consumer protections were in place in warranty disputes.¹¹⁰ The Commission explained that

¹⁰⁵ 40 FR 60168, 60193 (Dec. 31, 1975).

¹⁰⁶ According to the BBB Autoline program, a claim is initiated only after a consumer provides the VIN and signs the application. A claim cannot be initiated online without this information.

¹⁰⁷ See NCLC at 13-14; Johnson at 3; AHAM at 6.

¹⁰⁸ AHAM at 6-7.

¹⁰⁹ NCLC at 13-18; Johnson at 3.

¹¹⁰ 40 FR 60168, 60210 (Dec. 31, 1975).

“reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act.”¹¹¹ The Commission’s underlying premise was that its authority over Mechanisms encompassed all nonjudicial dispute resolution procedures referenced within a written warranty, including arbitration.

During the 1996-97 rule review, some commenters asked the Commission to deviate from its position that Rule 703 bans mandatory binding arbitration in warranties. The Commission, however, relying on its previous analysis and the MMWA’s statutory language, reaffirmed its view that the MMWA and Rule 703 prohibit mandatory binding arbitration.¹¹² As the Commission noted, Section 2310(a)(3) of the MMWA states that, if a warrantor incorporates an IDSM provision in its warranty, “the consumer may not commence a civil action (other than a class action) ... unless he initially resorts to such procedure.”¹¹³ The Commission concluded “Rule 703 will continue to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration.”¹¹⁴

Since the issuance of the 1999 FRN, courts have reached different conclusions as to whether the MMWA gives the Commission authority to ban mandatory binding arbitration in warranties.¹¹⁵ In particular, two appellate courts have questioned whether

¹¹¹ 40 FR 60168, 60211 (Dec. 31, 1975).

¹¹² 64 FR 19700, 19708 (Apr. 22, 1999).

¹¹³ *Id.* (quoting 15 U.S.C. 2310(a)(3)(C)(i)).

¹¹⁴ 64 FR 19700, 19708 (Apr. 22, 1999).

¹¹⁵ *See, e.g., Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024 (9th Cir. 2011), *withdrawn*, 676 F.3d 867 (9th Cir. 2012) (withdrawn pending the issuance of a decision on a separate issue by the California Supreme Court in *Sanchez v. Valencia Holding Co.*, S199119); *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002);

Congress intended binding arbitration to be considered a type of IDSM, which would potentially place binding arbitration outside the scope of the MMWA.¹¹⁶ Nonetheless, the Commission reaffirms its long-held view that the MMWA disfavors, and authorizes the Commission to prohibit, mandatory binding arbitration in warranties.¹¹⁷

First, as the Commission observed during the 1999 rule review, the text of section 2310(a)(3)(C)(i) contemplates that consumers will “initially resort” to IDSMs before commencing a civil action. That language clearly presupposes that “a mechanism’s decision cannot be binding, because if it were, it would bar later court action.”¹¹⁸ Similarly, section 2310(a)(3)(C) specifies that “decisions” in IDSMs shall be admissible in any subsequent “civil action.”¹¹⁹ As that language confirms, Congress intended that IDSMs resulting in a “decision”—*i.e.*, arbitration decisions rather than conciliation or mediation mechanisms—would precede and influence, but not foreclose, a subsequent judicial decision.

As the Commission has previously noted, the legislative history provides additional evidence that Congress intended all IDSMs, including arbitration proceedings, to be nonbinding.¹²⁰ The House committee report stated that “[a]n adverse decision in

Walton v. Rose Mobile Homes, LLC, 298 F.3d 470 (5th Cir. 2002); *see also Seney v. Rent-A-Center, Inc.*, 738 F.3d 631 (4th Cir. 2013).

¹¹⁶ *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002); *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002).

¹¹⁷ *See* 40 FR 60168, 60210 (Dec. 31, 1975) and 64 FR 19700, 19708 (Apr. 22, 1999).

¹¹⁸ 64 FR 19700, 19708 (Apr. 22, 1999).

¹¹⁹ 15 U.S.C. 2310(a)(3).

¹²⁰ 64 FR 19700, 19708 (Apr. 22, 1999).

any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the proceeding”¹²¹ That language confirms what Congress strongly implies in the statutory text: arbitration should precede but not preclude a subsequent court action.

The statutory scheme forecloses any argument that warranty-related arbitration proceedings fall outside the statutory category of “informal dispute resolution mechanisms” and thus outside the FTC’s rulemaking authority. As many legislators, policymakers, and courts understood at the time of the MMWA’s enactment, any arbitration proceeding is, by comparison to judicial proceedings, an “informal” “mechanism” for “dispute settlement,” and it thus falls squarely within the plain meaning of the term “informal dispute settlement mechanism.”¹²² Similarly, the MMWA’s conference report indicates that “arbiters”—*i.e.*, the decisionmakers in any arbitration proceeding—are responsible for making determinations in IDSMs, and thus further

¹²¹ Report to Accompany H.R. 7917, H.R. Rep. No. 93-1107, at 41 (1974) (report of the House Committee on Interstate and Foreign Commerce); *see also* S. Rep. No. 93-151, at 3 (1973) (report of the Senate Committee on Commerce) (“[I]f the consumer is not satisfied with the results obtained in any informal dispute settlement proceeding, the consumer can pursue his legal remedies in a court of competent jurisdiction . . .”).

¹²² *See, e.g.*, 119 Cong. Rec. 33,498 (1973) (statement of Sen. Magnuson); *Consumer Protection: Hearings Before the Consumer Subcomm. of the S. Comm. on Commerce*, S. Doc. No. 91-48, at 69 (1969) (statement of FTC Commissioner Elman); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974). The Supreme Court has repeatedly confirmed that arbitration is a method of informal dispute resolution. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (“[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”); *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate . . . , [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”).

confirms that arbitration is a form of IDSM.¹²³

Just as important, any argument that an “arbitration” can somehow elude classification as an IDSM would subvert the purposes of the MMWA’s IDSM provisions. To effectuate its declared policy of encouraging IDSMs that “fairly and expeditiously” settle consumer disputes, Congress: (1) created incentives for warrantors to develop IDSMs and (2) directed the Commission to issue and enforce baseline rules for IDSMs.¹²⁴ Congress would not have created this elaborate structure for warrantor incentives and agency supervision of warrantors who want to mandate use of certain contractual procedures in their warranties, while simultaneously permitting warrantors to evade that structure simply by using another contractual procedure and calling it something else (e.g., “binding arbitration”) and thereby immunizing it from all agency oversight.¹²⁵ Other courts have upheld binding arbitration in this context on the ground that the rationale of Rule 703 demonstrates an impermissible hostility toward arbitration in general and binding arbitration in particular.¹²⁶ The Commission does not believe this is correct. Like the statutory text, the Commission’s rules encourage arbitration proceedings when they comply with IDSM procedural safeguards and are not both

¹²³ Section 2304(b)(1) prohibits warrantors from imposing any additional duty on consumers unless the duty has been found reasonable in “an administrative or judicial enforcement proceeding” or “an informal dispute settlement proceeding.” 15 U.S.C. 2304(b)(1). The conference report indicates that the reasonableness of the additional duty is to be determined by “the Commission, *an arbiter*, or a court.” S. Rep. No. 93-1408, at 25, H.R. Rep. No. 93-1606, at 25 (1974) (Conf. Rep.) (emphasis added).

¹²⁴ 15 U.S.C. 2310(a)(1)-(4).

¹²⁵ 9 U.S.C. 1-16.

¹²⁶ See, e.g., *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002).

mandatory and binding. Moreover, the Commission's rules *permit* "post-dispute" binding arbitration, where the parties agree—after a warranty dispute has arisen—to resolve their disagreement through arbitration.¹²⁷ The Commission has also recognized that post-Mechanism binding arbitration is allowed.¹²⁸ The Commission's prohibition is limited only to instances where binding arbitration is incorporated into the terms of a written warranty governed by the MMWA.¹²⁹

AHAM also argues that eliminating the prohibition on binding arbitration would remove disincentives for warrantors to create a Mechanism and reduce judicial costs spent dealing with duplicative warranty cases. However, Congress already considered the issues of warrantor incentives and availability of judicial remedies. To encourage warrantors to create Mechanisms, Section 2310(a)(3) allows warrantors to specify that use of a Mechanism is a prerequisite to filing a MMWA suit.¹³⁰ The Commission believes that the current Rule appropriately implements the incentive structure that Congress established in the MMWA.

e. Change the statistical requirements.

Rule 703.6 requires the Mechanism to prepare indices and statistical compilations on a variety of issues, including warrantor performance, brands at issue, all disputes delayed beyond 40 days, and the number and percentage of disputes that were resolved,

¹²⁷ See 40 FR 60168, 60211 (Dec. 31, 1975).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ 15 U.S.C. 2310(a)(3).

decided, or pending.¹³¹ The Commission requires the compilation of indices and statistics in part so any person can review a Mechanism's files. "On the basis of the statistically reported performance, an interested person could determine to file a complaint with the Federal Trade Commission ... and thereby cause the Commission to review the bona fide operation of the dispute resolution mechanism."¹³²

Two commenters, the Center for Auto Safety and Mr. Nowicki, ask the Commission to repeal the Mechanism's record-keeping requirements contained in Rule 703.6.¹³³ The Center for Auto Safety claims that most of the categories for statistical analysis "are ambiguous, misleading or deceptive. Unfavorable consumer outcomes can be reported as favorable; untimely resolutions can be reported as timely."¹³⁴

Similar comments were received during the previous rule review. Then, commenters urged the Commission to abolish Rule 703.6 because the categories of statistical compilation were "either moot, nebulous, or even worse, misleading or deceptive."¹³⁵ The Commission then stated that it appreciated that Rule 703.6(e)'s statistical compilations cannot provide an in-depth picture of the workings of the Mechanism. "However, the statistics were not intended to serve that function. The statistical compilations attempt to provide a basis for minimal review by the interested parties to determine whether the IDSMS program is working fairly and expeditiously.

¹³¹ See generally 16 CFR 703.6(b)-(e).

¹³² 40 FR 60168, 60213 (Dec. 31, 1975).

¹³³ Center for Auto Safety at 1; Nowicki at 2.

¹³⁴ Center for Auto Safety at 1. Nowicki claims that empirical evidence suggests that the "compliance self-proclamations" may be false and warranties may be deceptive.

¹³⁵ See 64 FR 19700, 19710 (Apr. 22, 1999) (discussing Mr. Nowicki's comment).

Based on that review, a more detailed investigation could then be prompted.”¹³⁶ In addition, the Commission was mindful of the costs associated with substantial recordkeeping requirements, so as not to discourage the establishment of IDSMs. “Therefore, the Commission sought to minimize the costs of the recordkeeping burden on the IDSM while ensuring that sufficient information was available to the public to provide a minimal review.”¹³⁷ The Commission has reviewed the issue and believes that its previous position continues to be correct.

f. Audits and recordkeeping availability.

Rule 703.7 contains the audit requirements for the Mechanism. The Rule requires that an audit be performed annually evaluating: (1) warrantors’ efforts to make consumers aware of the Mechanism and (2) a random sample of disputes to determine the adequacy of the Mechanism’s complaint intake-process and investigation and accuracy of the Mechanism’s statistical compilations.¹³⁸ Each audit should be submitted to the Commission and made available to the public at a reasonable cost. For the last several years, the Commission has published the audits on its website, making them available to the public free of charge.

One commenter asks the Commission to change Rule 703.8 to “mak[e] all IDSM documents available online, and requir[e] the Commission to review samples of disputes to determine whether the mechanism fairly and expeditiously resolves disputes.”¹³⁹

Another commenter recommends that the Commission repeal the audit requirements for

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ 16 CFR 703.7.

¹³⁹ Nowicki at 2.

the same reasons as the statistical compilation requirements.¹⁴⁰ Similar to the Commission's reasoning in upholding the statistical compilation requirements, the Commission has decided to retain the audit requirements without change for two reasons. First, like the statistical compilation requirements, the audit function attempts to provide a general basis for interested parties to determine whether the IDSM program is working fairly and expeditiously. Second, the IDSM must make available the statistical summaries to interested parties upon request, and hold open meetings to hear and decide disputes.¹⁴¹ Given that Rule 703 already contemplates public access to Mechanism information, and that the Commission was mindful that substantial recordkeeping costs may discourage the establishment of IDSMs, the Commission will not impose at this time a mandatory electronic access requirement. Further, the Commission staff reviews the audits annually and confirms they are Rule 703 compliant. For these reasons, the Commission retains Rule 703.8 unchanged.

5. 16 CFR Part 239: Warranty Guides.

Several commenters ask the Commission to revise its Warranty Guides. First, three commenters¹⁴² ask the Commission to modify § 239.2 to allow for the advertising of warranties online. The Commission's Guides are not specific to any medium, and already are applicable to all media. Second, commenters recommend that the Guides provide explicit, detailed guidance explaining how retailers and warrantors can comply with the MMWA. As stated previously, the .Com Disclosures and the Businessperson's

¹⁴⁰ Center for Auto Safety at 1.

¹⁴¹ 16 CFR 703.8.

¹⁴² AHAM at 3; National Automobile Dealers Association at 2; Steinborn at 3.

Guide to Federal Warranty Law both provide additional guidance concerning online disclosure obligations. Therefore, part 239 will remain unchanged.¹⁴³

List of Subjects

16 CFR Part 700

Trade practices, Warranties.

16 CFR Part 701

Trade practices, Warranties.

16 CFR Part 703

Trade practices, Warranties.

For the reasons set forth above, the Federal Trade Commission amends 16 CFR parts 700, 701, and 703 as follows:

PART 700—INTERPRETATIONS OF MAGNUSON-MOSS WARRANTY ACT

1. The authority citation for part 700 continues to read as follows:

Authority: Magnuson-Moss Warranty Act, Pub. L. 93–637, 15 U.S.C. 2301.

2. Amend §700.1 by revising the second and fifth sentences of paragraph (g) and the first sentence of paragraph (i) to read as follows:

¹⁴³ AHAM and Steinborn ask the Commission to amend part 239 to recognize that “referral of consumers to manufacturer Internet sites which make available warranty information satisfies the requirement to disclose the actual product warranty information prior to purchase by consumer.” AHAM at 3; Steinborn at 3-4. Such reference is already contemplated for online retailers. Such reference, however, would be contrary to the requirements imposed for offline retailers, as discussed above. Second, AHAM recommends that the Guides be amended to require advertisers “to clearly and conspicuously disclose what component/system is warranted and for what duration and if the balance of the product is not covered or covered for a different duration disclose that as well to prevent the consumer from believing that the terms of the warranty apply to the entire product.” AHAM at 3-4. These requirements, however, are already encompassed in Rule 701.3(a)(2) and therefore not needed in the Guides.

§ 700.1 Products covered.

* * * * *

(g) * * * Section 103, 15 U.S.C. 2303, applies to consumer products actually costing the consumer more than \$10, excluding tax. * * * This interpretation applies in the same manner to the minimum dollar limits in section 102, 15 U.S.C. 2302, and rules promulgated under that section.

* * * * *

(i) The Act covers written warranties on consumer products “distributed in commerce” as that term is defined in section 101(13), 15 U.S.C. 2301(13). * * *

3. Amend §700.2 by revising the first sentence to read as follows:

§ 700.2 Date of manufacture.

Section 112 of the Act, 15 U.S.C. 2312, provides that the Act shall apply only to those consumer products manufactured after July 4, 1975. * * *

4. Amend §700.3 by revising the fourth and sixth sentences and footnote 1 of paragraph (a), the first sentence of paragraph (b), and the sixth sentence of paragraph (c) to read as follows:

§ 700.3 Written warranty.

(a) * * * Section 101(6), 15 U.S.C. 2301(6), provides that a written affirmation of fact or a written promise of a specified level of performance must relate to a specified period of time in order to be considered a “written warranty.”¹ * * * In addition, section

¹ A “written warranty” is also created by a written affirmation of fact or a written promise that the product is defect free, or by a written undertaking of remedial action within the meaning of section 101(6)(B), 15 U.S.C. 2301(6)(B).

111(d), 15 U.S.C. 2311(d), exempts from the Act (except section 102(c), 15 U.S.C. 2302(c)) any written warranty the making or content of which is required by federal law.

* * *

(b) Certain terms, or conditions, of sale of a consumer product may not be “written warranties” as that term is defined in section 101(6), 15 U.S.C. 2301(6), and should not be offered or described in a manner that may deceive consumers as to their enforceability under the Act. * * *

(c) * * * Such warranties are not subject to the Act, since a written warranty under section 101(6) of the Act, 15 U.S.C. 2301(6), must become “part of the basis of the bargain between a supplier and a buyer for purposes other than resale.” * * *

5. Amend §700.4 by revising the first sentence to read as follows:

§ 700.4 Parties “actually making” a written warranty.

Section 110(f) of the Act, 15 U.S.C. 2310(f), provides that only the supplier “actually making” a written warranty is liable for purposes of FTC and private enforcement of the Act. * * *

6. Amend §700.5 by revising paragraph (a) and the first and second sentences of paragraph (b) to read as follows:

§ 700.5 Expressions of general policy.

(a) Under section 103(b), 15 U.S.C. 2303(b), statements or representations of general policy concerning customer satisfaction which are not subject to any specific limitation need not be designated as full or limited warranties, and are exempt from the requirements of sections 102, 103, and 104 of the Act, 15 U.S.C. 2302-2304, and rules thereunder. However, such statements remain subject to the enforcement provisions of

section 110 of the Act, 15 U.S.C. 2310, and to section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

(b) The section 103(b), 15 U.S.C. 2303(b), exemption applies only to general policies, not to those which are limited to specific consumer products manufactured or sold by the supplier offering such a policy. In addition, to qualify for an exemption under section 103(b), 15 U.S.C. 2303(b), such policies may not be subject to any specific limitations. * * *

7. Amend §700.6 by revising the first sentence of paragraph (a) and the first, second, and fourth sentences of paragraph (b) to read as follows:

§ 700.6 Designation of warranties.

(a) Section 103 of the Act, 15 U.S.C. 2303, provides that written warranties on consumer products manufactured after July 4, 1975, and actually costing the consumer more than \$10, excluding tax, must be designated either “Full (statement of duration) Warranty” or “Limited Warranty”. * * *

(b) Based on section 104(b)(4), 15 U.S.C. 2304(b)(4), the duties under subsection (a) of section 104, 15 U.S.C. 2304, extend from the warrantor to each person who is a consumer with respect to the consumer product. Section 101(3), 15 U.S.C. 2301(3), defines a consumer as a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product. * * *

However, where the duration of a full warranty is defined solely in terms of first purchaser ownership there can be no violation of section 104(b)(4), 15 U.S.C. 2304(b)(4), since the duration of the warranty expires, by definition, at the time of transfer. * * *

8. Amend §700.7 by revising the first sentence of paragraph (a) to read as follows:

§ 700.7 Use of warranty registration cards.

(a) Under section 104(b)(1) of the Act, 15 U.S.C. 2304(b)(1), a warrantor offering a full warranty may not impose on consumers any duty other than notification of a defect as a condition of securing remedy of the defect or malfunction, unless such additional duty can be demonstrated by the warrantor to be reasonable. * * *

9. Amend §700.8 by revising the third sentence to read as follows:

§ 700.8 Warrantor's decision as final.

* * * Such statements are deceptive since section 110(d) of the Act, 15 U.S.C. 2310(d), gives state and federal courts jurisdiction over suits for breach of warranty and service contract.

10. Amend §700.9 by revising the first and third sentences to read as follows:

§ 700.9 Duty to install under a full warranty.

Under section 104(a)(1) of the Act, 15 U.S.C. 2304(a)(1), the remedy under a full warranty must be provided to the consumer without charge. * * * However, this does not preclude the warrantor from imposing on the consumer a duty to remove, return, or reinstall where such duty can be demonstrated by the warrantor to meet the standard of reasonableness under section 104(b)(1), 15 U.S.C. 2304(b)(1).

11. Amend §700.10 by revising the section heading, paragraph (a), the first sentence in paragraph (b), and paragraph (c) to read as follows:

§ 700.10 Prohibited tying.

(a) Section 102(c), 15 U.S.C. 2302(c), prohibits tying arrangements that condition coverage under a written warranty on the consumer's use of an article or service identified by brand, trade, or corporate name unless that article or service is provided without charge to the consumer.

(b) Under a limited warranty that provides only for replacement of defective parts and no portion of labor charges, section 102(c), 15 U.S.C. 2302(c), prohibits a condition that the consumer use only service (labor) identified by the warrantor to install the replacement parts. * * *

(c) No warrantor may condition the continued validity of a warranty on the use of only authorized repair service and/or authorized replacement parts for non-warranty service and maintenance (other than an article of service provided without charge under the warranty or unless the warrantor has obtained a waiver pursuant to section 102(c) of the Act, 15 U.S.C. 2302(c)). For example, provisions such as, “This warranty is void if service is performed by anyone other than an authorized ‘ABC’ dealer and all replacement parts must be genuine ‘ABC’ parts,” and the like, are prohibited where the service or parts are not covered by the warranty. These provisions violate the Act in two ways. First, they violate the section 102(c), 15 U.S.C. 2302(c), ban against tying arrangements. Second, such provisions are deceptive under section 110 of the Act, 15 U.S.C. 2310, because a warrantor cannot, as a matter of law, avoid liability under a written warranty where a defect is unrelated to the use by a consumer of “unauthorized” articles or service. In addition, warranty language that implies to a consumer acting reasonably in the circumstances that warranty coverage requires the consumer’s purchase of an article or service identified by brand, trade or corporate name is similarly deceptive.

For example, a provision in the warranty such as, “use only an authorized ‘ABC’ dealer” or “use only ‘ABC’ replacement parts,” is prohibited where the service or parts are not provided free of charge pursuant to the warranty. This does not preclude a warrantor from expressly excluding liability for defects or damage caused by “unauthorized” articles or service; nor does it preclude the warrantor from denying liability where the warrantor can demonstrate that the defect or damage was so caused.

12. Amend §700.11 by:

a. Revising the fourth and fifth sentences and adding a sixth sentence in paragraph (a); and

b. Revising the first sentence of paragraph (b) and the first and second sentences of paragraph (c).

The revisions and addition read as follows:

§ 700.11 Written warranty, service contract, and insurance distinguished for purposes of compliance under the Act.

(a) * * * The McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, provides that most federal laws (including the Magnuson-Moss Warranty Act) shall not be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance. While three specific laws are subject to a separate proviso, the Magnuson-Moss Warranty Act is not one of them. Thus, to the extent the Magnuson-Moss Warranty Act’s service contract provisions apply to the business of insurance, they are effective so long as they do not invalidate, impair, or supersede a State law enacted for the purpose of regulating the business of insurance.

(b) “Written warranty” and “service contract” are defined in sections 101(6) and 101(8) of the Act, 15 U.S.C. 2301(6) and 15 U.S.C. 2301(8), respectively. * * *

(c) A service contract under the Act must meet the definitions of section 101(8), 15 U.S.C. 2301(8). An agreement which would meet the definition of written warranty in section 101(6)(A) or (B), 15 U.S.C. 2301(6)(A) or (B), but for its failure to satisfy the basis of the bargain test is a service contract. * * *

PART 701—DISCLOSURE OF WRITTEN CONSUMER PRODUCT WARRANTY TERMS AND CONDITIONS

13. The authority citation for part 701 continues to read as follows:

Authority: 15 U.S.C. 2302 and 2309.

14. Amend §701.1 by revising paragraph (d) to read as follows:

§ 701.1 Definitions.

* * * * *

(d) *Implied warranty* means an implied warranty arising under State law (as modified by sections 104(a) and 108 of the Act, 15 U.S.C. 2304(a) and 2308), in connection with the sale by a supplier of a consumer product.

* * * * *

15. Amend §701.3 by revising paragraph (a)(7) to read as follows:

§ 701.3 Written warranty terms.

(a) * * *

(7) Any limitations on the duration of implied warranties, disclosed on the face of the warranty as provided in section 108 of the Act, 15 U.S.C. 2308, accompanied by the following statement:

Some States do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.

* * * * *

PART 703—INFORMAL DISPUTE SETTLEMENT PROCEDURES

16. The authority citation for part 703 continues to read as follows:

Authority: 15 U.S.C. 2309 and 2310.

17. Amend §703.1 by revising paragraph (e) to read as follows:

§ 703.1 Definitions.

* * * * *

(e) *Mechanism* means an informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of Title I of the Act applies, as provided in section 110 of the Act, 15 U.S.C. 2310.

* * * * *

18. Amend §703.2 by revising the second sentence of paragraph (a) to read as follows:

§ 703.2 Duties of warrantor.

(a) * * * This paragraph (a) shall not prohibit a warrantor from incorporating into the terms of a written warranty the step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty as described in section 102(a)(7) of the Act, 15 U.S.C. 2302(a)(7), and required by part 701 of this subchapter.

* * * * *

19. Amend §703.5 by revising paragraph (g)(2), the first sentence in paragraph (i), and the third sentence in paragraph (j) to read as follows:

§ 703.5 Operation of the Mechanism.

* * * * *

(g) * * *

(2) The Mechanism's decision is admissible in evidence as provided in section 110(a)(3) of the Act, 15 U.S.C. 2310(a)(3); and

* * * * *

(i) A requirement that a consumer resort to the Mechanism prior to commencement of an action under section 110(d) of the Act, 15 U.S.C. 2310(d), shall be satisfied 40 days after notification to the Mechanism of the dispute or when the Mechanism completes all of its duties under paragraph (d) of this section, whichever occurs sooner. * * *

(j) * * * In any civil action arising out of a warranty obligation and relating to a matter considered by the Mechanism, any decision of the Mechanism shall be admissible in evidence, as provided in section 110(a)(3) of the Act, 15 U.S.C. 2310(a)(3).

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark,
Secretary.

**Note: The following dissent will not appear in the Code of Federal Regulations.
Dissenting Statement of Commissioner Maureen K. Ohlhausen**

I voted against the Commission’s Final Revised Interpretations of the Magnuson-Moss Warranty Act (MMWA) Rule because it retains Rule 703.5(j)’s prohibition on pre-dispute mandatory binding arbitration.¹

Since the last Rule review in 1997, two federal appellate courts have held that the MMWA does not prohibit binding arbitration.² Noting the federal policy favoring arbitration expressed in the Federal Arbitration Act (FAA),³ these courts concluded that the MMWA’s statutory language and legislative history did not overcome the presumption in favor of arbitration and that the purposes of the MMWA and the FAA were not in inherent conflict. The courts also declined to give the Commission’s contrary interpretation *Chevron* deference.⁴ Although some lower courts have reached a different conclusion, there is no circuit court precedent upholding the Commission’s interpretation of the MMWA in Rule 703.5(j). Additionally, in several recent cases, the Supreme Court has indicated a strong preference for arbitration.⁵

The courts have sent a clear signal that the Commission’s position that MMWA prohibits binding arbitration is no longer supportable.⁶ When faced with such a signal, the Commission should not reaffirm the rule in question. I therefore respectfully dissent.

¹ I do not object to the other final actions taken in this review.

² See *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002); *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002).

³ 9 U.S.C. 1. See *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987) (noting that the presumption of the FAA is that arbitration is preferable and Congress must clearly override that presumption if it is to be disregarded).

⁴ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that courts defer to an agency’s interpretation of a statute if “(1) Congress has not spoken directly to the issue; and (2) the agency’s interpretation ‘is based on a permissible construction of the statute’”).

⁵ See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013), *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

⁶ See *Davis*, 305 F.3d at 1280 (“[T]he FTC’s interpretation of the MMWA is unreasonable, and we decline to defer to the FTC regulations of the MMWA regarding binding arbitration in written warranties.”).

